

AMENDED IN ASSEMBLY JUNE 26, 2003

AMENDED IN SENATE MAY 22, 2003

AMENDED IN SENATE MAY 6, 2003

AMENDED IN SENATE MARCH 17, 2003

**SENATE BILL**

**No. 186**

**Introduced by Senator Murray**

*(Coauthor: Assembly Member Maldonado)*

February 12, 2003

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An act to ~~amend Section 17538.4 of, and to~~ add Article 1.8 (commencing with Section 17529) to Chapter 1 of Part 3 of Division 7 of, the Business and Professions Code, relating to privacy.

LEGISLATIVE COUNSEL'S DIGEST

SB 186, as amended, Murray. Privacy: unsolicited e-mail advertising.

Existing law prohibits a person or entity conducting business in the state from e-mailing or causing to be e-mailed documents consisting of unsolicited advertising material for the lease, sale, rental, gift offer, or other disposition of any realty, goods, services, or extension of credit unless that person or entity establishes a toll-free telephone number or valid sender operated return e-mail address that a recipient may contact to notify the sender not to e-mail the recipient any further unsolicited documents. Existing law requires that notification of the toll-free telephone number, and a valid address that a recipient may write to, be included on these unsolicited e-mailed documents, and prohibits the e-mailing of these unsolicited advertising documents to a person who has requested not to receive any further unsolicited documents. Existing

law requires certain unsolicited e-mail advertisements to contain a heading of “ADV:” or “ADV:ADLT.” A violation of the provisions governing advertising is a misdemeanor.

This bill would prohibit an advertiser located in California from using unsolicited commercial e-mail advertisements. The bill would prohibit an advertiser not located in California from using unsolicited commercial e-mail advertisements sent to a California e-mail address if the advertiser knows or should reasonably know that it is a California e-mail address. The bill would provide that if any part of these provisions or their application is held invalid, the invalidity would not affect the other provisions.

This bill would authorize the recipient of a commercial e-mail advertisement transmitted in violation of these prohibitions, *the electronic mail service provider*, or the Attorney General to bring an action to recover *actual damages and liquidated damages of \$1,000 per individual violation transmitted message or \$1,000,000 per incident, as defined, whichever is less, subject to reduction by a court for specified reasons. The bill would also provide for an award of attorney’s fees and costs.* The bill would provide that a cause of action in existence prior to its enactment would be governed by the law in effect at the time it arose. *The bill would enact other related provisions.*

Because a violation of the bill would be a crime, it would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: yes.

*The people of the State of California do enact as follows:*

- 1 SECTION 1. Article 1.8 (commencing with Section 17529)
- 2 is added to Chapter 1 of Part 3 of Division 7 of the Business and
- 3 Professions Code, to read:
- 4

Article 1.8. Restrictions On Unsolicited Commercial E-mail  
Advertisers

17529. For the purpose of this article, the following definitions apply:

(a) “Advertiser” means a person or entity that advertises through the use of unsolicited commercial e-mail advertisements.

(b) “California electronic mail address” or “California e-mail address” means any of the following:

(1) An e-mail address furnished by an electronic mail service provider that sends bills for furnishing and maintaining that e-mail address to a mailing address in this state.

(2) An e-mail address ordinarily accessed from a computer located in this state.

(3) An e-mail address furnished to a resident of this state.

(c) “Commercial e-mail advertisement” means any electronic mail message initiated for the purpose of advertising or promoting the lease, sale, rental, gift offer, or other disposition of any property, goods, services, or extension of credit.

(d) “Direct consent” means that the recipient has expressly consented to receive the message, either in response to a clear and conspicuous request for the consent or at the recipient’s own initiative.

(e) “Domain name” means any alphanumeric designation that is registered with or assigned by any domain name registrar as part of an electronic address on the Internet.

(f) “Electronic mail” or “e-mail” means an electronic message that is transmitted between two or more telecommunications devices, computers, or electronic devices capable of receiving electronic messages, whether or not the message is converted to hard copy format after receipt or is viewed upon transmission or stored for later retrieval. “Electronic mail” or “e-mail” includes electronic messages that are transmitted through a local, regional, or global computer network.

(g) “Electronic mail address” or “e-mail address” means a destination, commonly expressed as a string of characters, to which electronic mail can be sent or delivered. An “electronic mail address” or “e-mail address” may include a user name or mailbox and a reference to an Internet domain.

1 (h) “Incident” means a single transmission of substantially  
2 similar content.

3 (i) “Internet” has the meaning set forth in paragraph (6) of  
4 subdivision (e) of Section 17538.

5 ~~(i)~~

6 (j) “Preexisting or current business relationship,” as used in  
7 connection with the sending of a commercial e-mail  
8 advertisement, means ~~either of the following:~~

9 ~~(1) That within the three year period ending upon receipt of the~~  
10 ~~advertisement, the recipient has made an inquiry, application,~~  
11 ~~purchase, or transaction regarding products or services offered by~~  
12 ~~the sender.~~

13 ~~(2) That the recipient has made an inquiry, application,~~  
14 ~~purchase, or transaction regarding products or services offered by~~  
15 ~~the sender and the sender maintains an electronic or written record~~  
16 ~~of the transaction.~~

17 ~~(j) that the recipient has made an inquiry, application,~~  
18 ~~purchase, or transaction regarding products or services offered by~~  
19 ~~the sender.~~

20 (k) “Recipient” means the addressee of a commercial e-mail  
21 advertisement. If an addressee of a commercial e-mail  
22 advertisement has one or more e-mail addresses to which a  
23 commercial e-mail advertisement is sent, the addressee shall be  
24 deemed to be a separate recipient for each e-mail address to which  
25 the advertisement is sent.

26 ~~(k)~~

27 (l) “Unsolicited commercial e-mail advertisement” means a  
28 commercial e-mail advertisement sent to a recipient who meets  
29 both of the following criteria:

30 (1) The recipient has not provided direct consent to receive the  
31 commercial e-mail advertisement.

32 (2) The recipient does not have a preexisting or current  
33 business relationship, as defined in subdivision-~~(i)~~ (j), with the  
34 advertiser of the realty, goods, services, or extension of credit.

35 17529.1. (a) Notwithstanding any other provision of law, if  
36 an advertiser is located in California, the advertiser shall not  
37 advertise using an unsolicited commercial e-mail advertisement.

38 (b) Notwithstanding any other provision of law, an advertiser  
39 that is not located in California shall not advertise using an  
40 unsolicited commercial e-mail advertisement that is sent to a

1 California e-mail address if the advertiser knows or should  
2 reasonably foresee that the e-mail address is a California e-mail  
3 address.

4 (c) The provisions of this section are severable. If any provision  
5 of this section or its application is held invalid, that invalidity shall  
6 not affect any other provision or application that can be given  
7 effect without the invalid provision or application.

8 17529.2. (a) In addition to any other remedies provided by  
9 this article or by other provisions of law, a recipient of an  
10 unsolicited commercial e-mail advertisement transmitted in  
11 violation of Section 17529.1, *the electronic mail service provider,*  
12 *or the Attorney General* may bring an action to recover ~~one~~  
13 ~~thousand dollars (\$1,000) for each individual violation of that~~  
14 ~~section.~~

15 ~~(b) In addition to any other remedies provided by this article or~~  
16 ~~by other provisions of law, the Attorney General may bring an~~  
17 ~~action against a person or entity in violation of Section 17529.1 to~~  
18 ~~recover one thousand dollars (\$1,000) for each individual~~  
19 ~~violation of that section.~~

20 ~~SEC. 2. Section 17538.4 of the Business and Professions~~  
21 ~~Code is amended to read:~~

22 ~~17538.4. (a) A person or entity conducting business in this~~  
23 ~~state shall not electronically mail (e-mail) or cause to be e-mailed~~  
24 ~~documents containing unsolicited advertising material for the~~  
25 ~~lease, sale, rental, gift offer, or other disposition of any realty,~~  
26 ~~goods, services, or extension of credit unless that person or entity~~  
27 ~~establishes a toll-free telephone number or valid sender-operated~~  
28 ~~return e-mail address that the recipient of the unsolicited~~  
29 ~~documents may call or e-mail to notify the sender not to e-mail any~~  
30 ~~further unsolicited documents.~~

31 ~~(b) An unsolicited e-mailed document subject to this section~~  
32 ~~shall include a statement informing the recipient of the toll-free~~  
33 ~~telephone number that the recipient may call, or a valid return~~  
34 ~~address to which the recipient may write or e-mail, as the case may~~  
35 ~~be, notifying the sender not to e-mail the recipient any further~~  
36 ~~unsolicited documents to the e-mail address, or addresses,~~  
37 ~~specified by the recipient.~~

38 ~~The statement shall be the first text in the body of the message~~  
39 ~~and shall be of the same size as the majority of the text of the~~  
40 ~~message.~~

~~(c) Upon notification by a recipient of his or her request not to receive any further unsolicited e-mailed documents, a person or entity conducting business in this state shall not e-mail or cause to be e-mailed any unsolicited documents to that recipient.~~

~~(d) This section shall apply when the unsolicited e-mailed documents are delivered to a California resident via an electronic mail service provider's service or equipment located in this state. For these purposes, "electronic mail service provider" means a business or organization qualified to do business in this state that provides individuals, corporations, or other entities the ability to send or receive electronic mail through equipment located in this state and that is an intermediary in sending or receiving electronic mail.~~

~~(e) As used in this section, "unsolicited e-mailed documents" means an e-mailed document or documents consisting of advertising material for the lease, sale, rental, gift offer, or other disposition of any realty, goods, services, or extension of credit that meet both of the following requirements:~~

~~(1) The documents are addressed to a recipient with whom the initiator does not have an existing business or personal relationship.~~

~~(2) The documents are not sent at the request of, or with the express consent of, the recipient.~~

~~(f) As used in this section, "e-mail" or "cause to be e-mailed" does not include or refer to the transmission of any documents by a telecommunications utility or Internet service provider to the extent that the telecommunications utility or Internet service provider merely carries that transmission over its network.~~

~~(g) In the case of e-mail that consists of unsolicited advertising material for the lease, sale, rental, gift offer, or other disposition of any realty, goods, services, or extension of credit, the subject line of each and every message shall include "ADV:" as the first four characters. If these messages contain information that consists of unsolicited advertising material for the lease, sale, rental, gift offer, or other disposition of any realty, goods, services, or extension of credit that may only be viewed, purchased, rented, leased, or held in possession by an individual 18 years of age and older, the subject line of each and every message shall include "ADV:ADLT" as the first eight characters.~~

~~(h) An employer who is the registered owner of more than one e-mail address may notify the person or entity conducting business in this state e-mailing or causing to be e-mailed documents consisting of unsolicited advertising material for the lease, sale, rental, gift offer, or other disposition of any realty, goods, services, or extension of credit of the desire to cease e-mailing on behalf of all of the employees who may use employer provided and employer-controlled e-mail addresses.~~

~~(i) This section shall not apply to an advertiser subject to Article 1.8 (commencing with Section 17529) of this chapter.~~

~~(j) This section, or any part of this section, shall become inoperative on and after the date that federal law is enacted that prohibits or otherwise regulates the transmission of unsolicited advertising by electronic mail (e-mail).~~

*SEC. 3.—, in addition to actual damages, liquidated damages of one thousand dollars (\$1,000) for each unsolicited commercial e-mail advertisement transmitted in violation of this article, or one million dollars (\$1,000,000) per incident, whichever is less. The recipient, electronic mail service provider, or Attorney General, if the prevailing party, may also recover attorney's fees and costs. However, there shall not be a cause of action against an electronic mail service provider that transmits the unsolicited commercial e-mail advertisement over its computer network.*

*(b) If the court finds that the defendant established and implemented, with due care, practices and procedures reasonably designed to effectively prevent unsolicited commercial e-mail advertisements that are in violation of this article, the court shall reduce the liquidated damages recoverable under subdivision (a) to one hundred dollars (\$100) for each unsolicited commercial e-mail advertisement, or one hundred thousand dollars (\$100,000) per incident, whichever is less.*

*(c) At the request of any party to an action brought pursuant to this article, the court, in its discretion, may conduct all legal proceedings in a manner as to protect the secrecy and security of the computer, computer network, computer data, computer program, and computer software involved in order to prevent possible reoccurrence of the same or similar act by another person and to protect the trade secrets of any party.*

*17229.3. Nothing in this article shall be construed to have any effect on the lawfulness or unlawfulness, under any other provision*

1 *of law, of the adoption, implementation, or enforcement by a*  
2 *provider of Internet access service of a policy of declining to*  
3 *transmit, route, relay, handle, or store certain types of electronic*  
4 *mail messages.*

5 *SEC. 2.* A cause of action that is in existence before the  
6 effective date of this act shall not be affected by this act, but shall  
7 instead be governed by the law that was in effect at the time the  
8 cause of action arose.

9 ~~*SEC. 4.*~~

10 *SEC. 3.* No reimbursement is required by this act pursuant to  
11 Section 6 of Article XIII B of the California Constitution because  
12 the only costs that may be incurred by a local agency or school  
13 district will be incurred because this act creates a new crime or  
14 infraction, eliminates a crime or infraction, or changes the penalty  
15 for a crime or infraction, within the meaning of Section 17556 of  
16 the Government Code, or changes the definition of a crime within  
17 the meaning of Section 6 of Article XIII B of the California  
18 Constitution.

